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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 504.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

PACIFIC GREYHOUND LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT.

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This cause is before the Court on a writ of certiorari to the Circuit Court of Appeals of the Ninth Circuit, challenging the Order or Decree of that Court in proceedings instituted therein by the National Labor Relations Board to enforce an Order issued by the Board in ostensible conformity with the National Labor Relations Act, in so far as the decree of the Court failed to enforce certain provisions of the Board's order.

STATEMENT

The issue here presented is in many respects similar to that involved in the case of the Pennsylvania Greyhound

Lines, No. 413, pending concurrently before the Court.

The issues in the cause last mentioned challenge the authority and jurisdiction of the Labor Board on the grounds, (a) that the proceedings were instituted by a party lacking representative status or authority, and (b) that the employer and employee relation did not exist. These features are not involved in the instant case.

In both causes, the order of the Labor Board incorporated in its terms what was in effect a mandatory injunction requiring the disestablishment of an organization of its employees. In both, the respective Appellate Courts refused to enforce the mandatory injunction indicated.

In the instant case the organization of respondent's employees was created in 1933 and continued from the date of its organization down to and including the period covered by the hearings before the Labor Board. Following the enactment of what is commonly mentioned as the NIRA, including the labor provisions incorporated in that Act in Section 7a, efforts were made by the Brotherhood of Railroad Trainmen and the Brotherhood of Locomotive Firemen and Enginemen (fundamentally railroad labor organizations), to unionize respondent's employees. Out of the efforts thus inaugurated grew the controversies which gave rise to the proceedings here instituted by the Labor Relations Board.

ARGUMENT

As the issues now presented turn on the application of principles of law and these last have been fully considered in respondents' brief in the Pennsylvania Case, which is assigned for hearing at the same time as that here involved, reargument of those issues herein would entail repetition which seems both undesirable and unnecessary.

We think however, that the situations presented by the facts should, in certain particulars, be differentiated. The assumption here that the employer dominated the employees' organization is, to say the least, strained. That the employer frankly and openly expressed opposition to outside railroad labor unions may be conceded. That it equally frankly urged upon its employees the desirability of affiliating themselves with the employees' organization, may not be open to serious dispute. That it assumed to, or did in fact, undertake to dominate the freedom of action by the employees' organization in respect to the latter's representation of its members, seems tacitly if not expressly refuted in petitioner's brief.

It is true that stress is laid on the remarks testified to by a disgruntled employee as having been made by respondent's president at one or more meetings of the members of the employees' organization. We insist, however, that faced with the conditions which then confronted the executive mentioned, no sane executive, conscious of his responsibilities could have adopted any other reasonable course than that actually taken.

Let it be emphasized in this connection that respondent was called upon to face the prospects of the injection of a railroad labor organization into the administrative details of its operation. It is sufficiently shown by the evidence in the record and is a fact of such common knowledge as to justify the assumption that the court may take judicial cognizance thereof, that almost constant warfare has been waged on the part of the railroads against what for brevity we may term, bus systems, and that it was hardly to be expected that the hostility thus mentioned would not be reflected in the attitudes of railroad employees and their organizations.

As respects remarks ascribed to others of respondent's managerial force, made at meetings of the employees' organization, which in their last analysis amounted to little more than the statement that regardless of any action had by the organization, respondent's president would have the last word, we fail to perceive any substantial ground for criticism.

This, for the very obvious reason that no action had or taken by the employees' organization was binding on respondent without its consent. The principle has been clearly stated in the recent decisions of this Court, that the scope of the National Labor Relations Act is limited to the requirement of collective bargaining, not to the making of agreements.

As respects the specific provisions of the Labor Board's order, which the Appellate Court declined to enforce, we think that the frank concessions made in the brief of petitioner in the intant case in disclosing the real objective of those provisions, adequately demonstrate their arbitrary and unreasonable effects and confirms the conclusions of the lower court.

In other respects than those thus noted, respondent submits the present case on the grounds asserted in the Pennsylvania brief.

CONCLUSION

Certain features were alluded to in the Pennsylvania case intended to demonstrate that the issue there presented might be considered as of purely moot character.

In the instant case different features lead to a similar conclusion.

Following the Order of the labor here in question, on May 25, 1937, the Brotherhood of Locomotive Firemen &

Enginemen filed a petition with the Regional Director of the Labor Board, requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act for employees of Pacific Greyhound Lines. Hearings were held by the Board on July 12th and 13th, 1937. By decision dated December 16, 1937, the Board directed that an election be held to ascertain representatives for the purpose of collective bargaining with Pacific Greyhound Lines and to determine whether the employees "desire to be represented by Brotherhood of Locomotive Firemen & Enginemen or Amalgamated Association of Street Electric Railway and Motor Coach Employees of America" or "by neither." Such election is now in process of being held (Case No. R-195, 4 NLRB 72).

In these circumstances it would seem to follow that the whole question would be resolved in such proceeding as the result of such election and that there is really nothing of substance as far as the questions raised on the present record are concerned.

United States vs. Anchor Coal Co., 279 U. S. 812.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 504.—October Term, 1937.

National Labor Relations Board, Petitioner, *vs.* Pacific Greyhound Lines, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 28, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

This case, which comes here on certiorari to the Court of Appeals for the Ninth Circuit, presents the same issues discussed in No. 413, *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, decided this day, but on a somewhat different state of facts. The only question requiring separate consideration is whether, in a case in which the National Labor Relations Board has ordered respondent to cease certain unfair labor practices, including the domination and financial support of a company union, the facts justify its further order that respondent withdraw all recognition of the union and give appropriate notice of the withdrawal to employees.

The Court of Appeals for the Ninth Circuit sustained the Board's findings and all of its order except the affirmative parts relating to withdrawal of recognition of the company union, which it set aside. 91 F. (2d) 458. The authority conferred on the Board by § 10 (c) of the National Labor Relations Act to direct withdrawal of employer recognition when such an order will carry out the policies of the National Labor Relations Act was considered and sustained in the *Pennsylvania Greyhound Lines, Inc.* case, *supra*. The question calling for attention here is whether the facts found by the Board afford a basis for its conclusion that the policies of the Act will be effectuated by the present order.

The findings show that respondent, an interstate carrier by motor bus, took an active and leading part in the organization in 1933 of the Drivers' Association, a labor organization of its employees; that respondent had since continuously interfered with and dominated

the internal administration of the Association, and contributed to its support; that through such domination it had obtained a "working agreement" with the Association in which it was stipulated that grievances of any employee should be presented first to his superior officer and then to respondent's president, whose decision should be final.

Before the enactment of the National Labor Relations Act, respondent twice made successful use of the Association as a means to forestall attempts to organize its employees, one in 1933 by the Brotherhood of Locomotive Engineers and Firemen, and another in 1934 by the employees themselves who sought to establish a Brotherhood of Motor Coach Operators. Respondent's officers were active in persuading, threatening and coercing employees to join or remain members of the Drivers' Association, and not to join the rival unions. In 1935, following the passage of the National Labor Relations Act, there was a renewed but unsuccessful attempt by respondent's employees to establish an organization affiliated with the Brotherhood of Locomotive Engineers and Firemen. The attempt was met by persuasions and warnings of respondent's employees, by its officers, not to join the new union, and by threats of discharge if they should join. The Board found that the respondent had engaged in unfair labor practices in violation of § 8 (1), (2), and ordered the cessation of these practices and withdrawal of respondent's recognition of the Drivers' Association.

While the formal provisions, in constitution and by-laws, for insuring employer control of the company union in the *Pennsylvania* case are wanting here, the record shows, as the Board found, that employer control of the Drivers' Association was none the less effective. During a period of three years it had been successfully used by respondent as an instrument for preventing three successive attempts for the organization by respondent's employees of a union free from company domination. In ordering withdrawal of recognition of the Drivers' Association by respondent, the Board pointed out that a mere order to cease the unfair labor practices "would not set free the employee's impulse to seek the organization which would most effectively represent him"; that continued recognition of the Drivers' Association would provide respondent "with a device by which its power may now be made effective unobtrusively, almost without further action on its part. Even

though he would not have freely chosen" the Association "as an initial proposition, the employee, once having chosen, may by force of a timorous habit, be held firm to his choice. The employee must be released from these compulsions."

Whether the continued recognition of the Drivers' Association by respondent would be a continuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing, was an inference of fact which the Board could draw if there was evidence to support it. Section 10 (e); see *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297. We cannot say that the Board's conclusion was without support in the evidence and in the subsidiary findings which respondent does not challenge.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

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